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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1976

NO. 75-6907

BOBBY LEE BARKER, Petitioner

VS.

THE STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of North Carolina filed on March 3, 1976 and certified on March 15, 1976 and as later affirmed by the Supreme Court of North Carolina in denying discretionary appeal, said judgment denying in this appeal filed on the 15th day of April, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals was rendered and filed on March 3, 1976 and reported as an unpublished opinion at 288 NC App. 729. A copy of this opinion is hereto attached and made a part of this Petition. The defendant appealed for discretionary review and said discretionary review was denied by the Supreme Court of North Carolina on April 15, 1976 and a copy of that judgment is hereto attached and made a part of this Petition.

JURISDICTION

The opinion of the Court of Appeals was rendered and filed on March 3, 1976 and bearing opinion number 7527SC827 and certified on March 15, 1976 and reported as an unpublished opinion at 288 NC App. 729. In due time a Petition for Discretionary Review to the Supreme Court of North Carolina was filed on March 17, 1976 and said Petition was denied by the Supreme Court of North Carolina on April 15, 1976. The Petition for a Writ of Certiorari to the Supreme Court of the United States was filed in said United States Supreme Court in apt time. This Court's jurisdiction is invoked under 28 U.S. Code Section 1257 (3).

QUESTIONS PRESENTED

Has the Petitioner been deprived of his constitutional right to due process of law under the 5th Amendment of the Constitution of the United

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States by the failure of the State's Courts of North Carolina to give retroactive application to the decision of the United States Supreme Court as found in Mullaney v. Wilbur, 421 U.S. 684?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The defendant Bobby Lee Barker was charged with the murder of his brother, D. L. Barker on the 16th day of August, 1974. A true bill was returned by the Grand Jury on the 30th day of September, 1974 and the defendant was placed on trial during the March 17, 1975 Regular Criminal Session of Superior Court in Gaston County, North Carolina with the Honorable Sam J. Ervin, III presiding.

The State elected to proceed only on the charge of 2nd Degree Murder to which the defendant entered a plea of not guilty. The evidence presented by the State showed a homicide of defendant's brother, and a knife being found near the body. The defendant's evidence tended to show that the deceased was coming at him with a knife after threatening him and that the defendant pulled a revolver to scare the deceased and that the gun went off. The defendant stated that he did not mean to kill the deceased but that he was simply acting in self-defense. At the close of all the evidence, the defendant movedfor a judgment of non-suit or dismissal which was overruled.

The Judge's Charge placed the burden on the defendant to satisfy the jury as to reducing the charge from 2nd Degree Murder to Manslaughter and to show that the killing was done in self-defense. The following charge of the Judge was given to the jury.

> "A" In order to reduce the crime to voluntary manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part; and in order to excuse his act altogether on the ground of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense. To

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negate malice and thereby reduce the crime to manslaughter the defendant must satisfy you of three things. First, that he shot D. L. Barker in the heat of passion. This does not mean mere anger. It means that the defendant's state of mind was at the time so violent as to overcome his reason so much that he could not think to the extent necessary to form a deliberate purpose and control his actions.

Second, that this passion was produced by acts of D. L. Barker which the law regards as adequate provocation. This may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition; and third, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

To excuse the killing entirely on the ground of self-defense, the defendant must satisfy you of four things. First that it appeared to the defendant and he believed it to be necessary to shoot D. L. Barker in order to save himself from death or great bodily harm. Second, that the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant as compared to that of D. L. Barker, the fierceness of the assault, if any, upon the defendant, whether or not D. L. Barker had a weapon in his possession, and the reputation, if any, of D. L. Barker for danger and violence.

Third, that the defendant was not the aggressor. If he voluntarily and without provocation entered the fight, he was the aggressor. One enters a fight voluntarily if he uses toward his opponent abusive language which considering all of the circumstances is calculated and intended to bring on a fight, and fourth, that the defendant did not use excessive force; that

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is, more force than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to him at the time. As you will recall, there is evidence in this case tending to show that D. L. Barker made certain threats against the defendant prior to this shooting. There is also evidence tending to show that the deceased, D. L. Barker, had a reputation of being a dangerous and violent fighting man. The Court will instruct you briefly as to the significance of this evidence in this case.

The Court instructs you that where self defense, is in issue, the deceased person's violent character is to be considered for two purposes. First, if it was known to the defendant, then it may be considered on the question of reasonable apprehension of death or bodily harm. Second, whether it was known to the defendant or not, it is to be considered on the question of which party was the actual aggressor since a man of violent character is more likely to have made the initial attack than is one who has a peaceable disposition.

So, in determining what the defendant's state of mind was and in determining who the aggressor was, you may consider the evidence as to the character of the deceased as being a dangerous and violent fighting man.

The Court further instructs you that with reference to the evidence of threats by the deceased against the defendant that threats of the deceased when communicated to a defendant may be considered upon the defendant's reasonable apprehension of death or serious bodily harm and that this evidence may also be considered as tending to show that the deceased was the aggressor, and that evidence may be considered by you in your deliberations and in arriving at your verdict.

If you find that the defendant acted property in self defense, he would be not guilty. This is to say if you find that the defendant acted in self defense, it would be your duty to return a verdict of not guilty. However, if the defendant though otherwise acting

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in self-defense used excessive force or was the aggressor though he had no murderous intent when he entered the fight, if he did, then the defendant would be guilty of voluntary manslaughter. "B"

The defendant by and through his attorney objected and excepted to the charge of the Judge in the record and that said case was then appealed to the Court of Appeals of North Carolina solely on the grounds that the charge improperly placed the burden of proof as to self-defense and as to mitigation on the defendant in violation of Mullaney v. Wilbur, 421 U.S. 684.

The Court of Appeals of North Carolina held that defendant Barker's case was controlled by the N.C. Supreme Court ruling of State v. Hankerson, 288 N.C. 632 in which the North Carolina Supreme Court held that Mullaney, supra was not retroactive. The Court of Appeals dismissed defendant's appeal in an Opinion filed on March 3, 1976 and certified on March 15, 1976. Defendant then petitioned for discretionary review to the North Carolina Supreme Court on March 17, 1976 and the North Carolina Supreme Court denied Motion for Discretionary Review and dismissed the appeal on April 15, 1976. The defendant then filed the Petition for Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The Opinion of the North Carolina Court of Appeals citing the case of States v. Hankerson, supra and as affirmed by the North Carolina Supreme Court, in dismissing the Petition for Discretionary Review has decided a federal question of the utmost importance to the administration of criminal justice in the United States that has not been previously decided by the United State Supreme Court. The question is whether or not the Supreme Court decision in Mullaney v. Wilbur, 421 U.S. 684 should be given retroactive application. It is respectfully contended that the decision of the North Carolina Supreme Court in Hankerson, supra rejecting retroactive application of Mullaney, is in error and that the Supreme Court of the United States should grant this Petition in order to decide for itself the question of Mullaney's retroactive application.

It has generally been held that the three factors or criteria for the retroactive application of any Supreme Court rule are: 1. The purpose to be served by the particular new rule; 2. The extent of reliance which have been placed upon the old rule; and 3. The effect on the administration of justice of the retroactive application of the new rule. The primary purpose of the rule of Mullaney was to re-affirm the substantial fundamental right of each defendant to have the State prove his guilt beyond a reasonable doubt as required

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rule dealing with the ultimate question of guilt or innocence.

Mullaney was not decided to impede a lawless action of police as cited in Linkletter v-. Walker, (1965) 381 U.S. 681 14 L. Ed. 2d 601, 85 S. Ct. 1731. Rather the purpose to be served by this particular new rule is to enhance the integrity of the fact finding process designed to decide the accused's fate, as found in Witherspoon v. Illinois, (1968) 391US510, 20 L.Ed. 2d 776, 88 S.CT. 1770, reh den 398 US 898, 21 L.Ed 2d 186, 89 S.CT. 67. Mullaney goes to the heart of the American system of criminal jurisprudence and is not simply a criminal procedure rule fostered to deter the police or to make a more streamlined administration of justice. It is specifically a decision which affects the final arbitration of guilt or innocence and sets the standard of the burden of proof as required under our law.

Secondly, there has been no reliance place on the old rule by any large numbers of states. As specifically stated in Mullaney, there are numerous states which do not follow the North Carolina or Main Rule and which in fact, require the state to negate self defense and to prove an illegal homicide. In fact, the United States Supreme Court as early as In Re Winship, 397 US. 358 decided that the application of the due process of law to the fact finding process required the state to prove every element of the crime beyond a reasonable doubt. And Winship was given retroactive effect in Ivan V. vs. City of New York, 407 US 203 (1972).

Thirdly, the effect on the administration of justice by giving retroactive application to the Mullaney rule would not be harsh in that this rule relates only to those homicide cases in which self-defense was a litigated issue. It is respectfully contended that the number of cases to be handled by the courts on re-hearings which would have been required by a general retroactive application as a constitutional rule, would be a relatively small number.

CONCLUSION

Defendant contends that the decision of the N.C. Court of Appeals in applying the N.C. Supreme Court decision of Hankerson in the instant case, was in error and that the U.S. Supreme Court should grant Certiorari to rightfully decide whether or not Mullaney should be given retroactive effect.

Respectfully Submitted.

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